

LAW AND CONTEMPORARY PROBLEMS

VOLUME V

SUMMER, 1938

NUMBER 3

FOREWORD

Unless the title of this symposium is read in the context afforded by the title of the periodical, there is a risk that its purpose will be misapprehended. The problem of investing the billions of dollars which constitute the trust funds of the nation is normally conceived in economic terms, but it is not to the economic questions of investment policy that this symposium is primarily directed. Instead, it takes as its point of departure the fact that the trustee, as an investor, occupies a distinct status, one which both restricts the scope of his investment activities and subjects him to special and serious responsibilities. These restrictions and responsibilities are the product of law, interacting with economic and social factors, over a period centuries long. Today the institution of the trust has reached a stage in its development which, when viewed in the perspective of its history, may aptly be termed critical. Economic and social trends that have been gathering momentum for a generation have been operative within the institution itself and are reflected in the vast increase in the volume of trust funds and in the shift in the status of the trust from a device utilized almost exclusively by the wealthy to one of the commonest forms for conserving accumulated savings. Developments such as these tend to magnify the incidence upon the institution of those forces extrinsic to it which are making for instability in the national economy and hence for instability in the investment market. That these trends are generating pressures which in turn will produce significant modifications in the special status of the trustee as investor seems evident, and it is the purpose of this symposium to explore the principal areas wherein processes of change are already becoming manifest.

This symposium has been organized on the assumption that it is not to the courts that one must turn for assistance in this period of institutional change. The need is for devices designed and adequate to *prevent* maladjustments. As emphasis swings, in the treatment of any major legal problem, from adjudicating the claims of conflicting interests to preventing those claims from arising, the judicial process becomes increasingly ill-adapted to the task. Adjudication requires principles and standards of broad applicability, buttressed by a few specific rules. These the courts can supply and administer. Prevention dictates adjustments in the underlying situation and the prescribing of rules differentiated, detailed, and often arbitrary in the sense that, say, the fixing of *any* given maximum for investment in a common trust fund must be arbitrary. It is to legislation, broadly conceived, that one must look for the effecting

of such adjustments and the formulation of such rules, the administration of which will not infrequently entail the creation of agencies specially adapted to the task.

Accordingly, in this symposium, no effort has been made to traverse the familiar ground of court decision but instead emphasis has been given to what may be termed a legislative approach. That approach, it should be added, is not the monopoly of legislatures and of administrative bodies vested with rule-making powers. A will, a trust indenture, a common trust fund plan, each represents, for the parties, a redistribution of rights and duties which, analytically, is legislative in all but its immediate source. The institution of the trust may be shaped in its future development through such instruments as well as by statutes and decrees.

Preliminary to the studies of the varying facets of the legislative problem is an article, *Trust Investments: Their Extent and Some Related Economic Problems*, by Professor N. Gilbert Riddle of The Ohio State University, author of "The Investment Policy of Trust Institutions," which affords ample evidence, if evidence is needed, of the significance of the subject of this symposium. The author marshals such data with respect to trust investments as official reports and individual studies, including his own, have made available and describes the investment trends, policies and problems which are disclosed.

Yet statistical studies, however refined, of the portfolios of the nation's trust institutions, will reveal only the effects of current dislocations, not their causes. And while thorough analysis of these causes could stop nowhere short of a comprehensive inquiry into the malfunctioning of the world's economy, still, from the trustee's standpoint, a single complaint serves to epitomize their character: instability of values. This instability is not that normal degree of uncertainty which explains why we need trustees rather than mere custodians, but an instability which has led some to question whether the trustee's undertaking to conserve wealth can long remain feasible at all. Mr. Louis S. Headley, Vice-President of the First Trust Company of St. Paul, has addressed himself to a consideration of this development in an essay entitled *A Trustee in a World of Changing Values*, in which he examines the concept of value and the rôle of money in relation to it, coming thence to the problems posed for the trustee by the menace of inflation.

The incidence of value instability is harshest on the smaller trusts where earned income barely suffices to meet the beneficiaries' needs in times of normal yields, yet here "legislative" ingenuity applied to the trust instrument may provide an effective solution. Devices to this end, which are beginning to come to the fore, are discussed by Mr. H. G. Carpenter, Vice-President of E. W. Axe & Co., New York investment counsel, in *The "Fixed-Income," "Annuity," and "Modernized" Types of Trust*, all of which depart from the traditional trust concept of impartiality between life tenant and remainderman by provisions assuring adequate income for the life tenant whether this income represents earned income or invasion of principal.

Even though such departures are not to be ventured, the drafting of the normal trust instrument presents pitfalls aplenty for the unwary. Drawing on his wide

studies of trust instruments and a judgment "informed by experience," Mr. Gilbert T. Stephenson, Director of the Trust Research Department of the Graduate School of Banking, presents as the third article of the symposium a consideration of *Trust Investment Provisions Which Have Worked Well*, which illustrate the extent to which, within the framework of existing law, the draftsman's art has facilitated trust investment management.

Traditionally, it has been through the specification of securities legal for investment that the legislatures have endeavored to supplement the judicial supervision of trust investments. The lists in force in the twenties have been subjected to severe strain in the past nine years, and their reconsideration at this time seems imperative. This has been undertaken in an article, *The Modernization of Legal Lists*, by Mr. William R. White, New York State Superintendent of Banks and his assistant, Mr. Irving A. J. Lawres. They are candid in their criticism of existing lists and skeptical of the feasibility of devising any list sufficient to withstand economic fluctuations over a period of years. As a means of imparting flexibility to the lists, they find the plan of vesting in an official board power to establish or revise the legal list, deserving of further consideration. As a background for any proposals for change in the structure of legal lists, it is important to know how these lists have fared at the hands of legislatures during the depression period. Mr. Gustav B. Margraf, honor student in the Duke School of Law, has endeavored, in an article on *Laws Relating to the Investment of Trust Funds, 1930-1937*, to canvass all the pertinent legislation enacted since the onset of the depression and to indicate the changes in digest form.

Excluded from this article is one branch of trust investment legislation that is largely a product of recent years: the laws authorizing the establishment of common trust funds. The importance of the common fund as a means of meeting the problems incident to the popularization of the trust is potentially tremendous. The eight states which through 1937 had enacted laws authorizing these funds have provided material for the article following, *Common Trust Fund Legislation*, an analysis of the provisions of these statutes prepared by Robert W. Bogue, also an honor student at the Duke Law School.

In the future, however, it seems certain that the character of the common funds will, basically, be determined by the form taken by the Federal Reserve Board regulations, compliance with which is necessary to afford the funds immunity from taxation as corporations. These regulations are discussed in the succeeding article, *Federal Reserve Board Regulations of Common Trust Funds*, by C. Alexander Capron of the New York Bar, who served in an advisory capacity to the committees cooperating in the formulation of the Board's rules. Mr. Capron deals in succession with the problems confronting the draftsmen and explains the purposes of the principal provisions in the light of these problems.

Since neither the regulations nor the state statutes purport to deal with all the problems which may be encountered in the operation of a fund, an article has been included which discusses *Problems in the Administration of Common Trust Funds*,

its author being Mr. Rodman Ward, Trust Officer of the Equitable Trust Company of Wilmington, one of the pioneer institutions in the common trust fund movement.

A development dating from depression days which represents essentially a preventive technique is the subjection of the trust departments of banking institutions to periodic examination by federal and state authorities. The procedure evolved for such examination is described in an article, *The Activities of Bank Examiners with Respect to Trust Investments*, by E. P. Neilan, Trust Examiner of the Federal Reserve Bank of Philadelphia.

The final article of the symposium is premised on the fact that there is one problem that can never be solved: the risk of failure of the human equation in the administration of trust funds. Since the effort to shift this risk from the trustee to the beneficiary by means of sweeping exculpatory clauses seems destined to frustration by the law, the possibility of insurance as a protective device at once suggests itself. In *Trustee's Insurance against Surcharge for Investment Losses*, Mr. S. A. Coykendall, Jr., a New York insurance broker who has originated a number of new forms of insurance protection, discusses the possibilities for protection of this character.

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